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2. THE FIFTH AMENDMENT PRIVILEGE AND IMMUNITY LEGISLATION

*Rufus King**

My assigned subject may be entitled to a relatively minor place in this discussion of ways to combat organized crime. Yet it is a complex subject, encrusted with legal history, and in the public mind it has sometimes loomed out of all proportion to the problem. Periodically, the fifth amendment privilege has been made to appear as a formidable refuge for all the scoundrels in our land. And then there follows a surge of popular interest in immunity legislation.¹

The immunity bargain, by which society strips wrongdoers of their constitutional privilege of silence in return for testimony sought to be compelled from them, is not a very good bargain for anyone concerned.² But it sometimes plays a part in penetrating criminal conspiracies. And "criminal conspiracy" is an almost exact synonym of "organized crime." Most of the so-called crime syndicate activities: drug peddling, gambling, extortion, commercialized vice — and also most of the truly dangerous threats to national security — depend on concerted action by many persons. Often they depend as well on participation or acquiescence by those who are supposed to be enforcing the laws they offend. And in such cases, if the ordinary methods of investigation break down, it may be necessary for society to buy the defection of a few small-fry criminals, and to force them to play the role of informer in order to assure convictions among the ringleaders.

That is the theory of the immunity device, and that is how it works occasionally — but only occasionally — in practice.

The confusion that plagues this area begins with the fifth amendment privilege itself. I know of no other instance in the whole sweep of our constitutional law where we have permitted a plain statement by the Founders to be so obscured, or where we permit a Bill of Rights principle to be so far altered by legislative fiat. Moreover, few constitutional doctrines have been so stretched and embroidered by the courts.

I believe the Founders themselves started us off on the wrong foot: the privilege against self-incrimination should not have been enumerated in the fifth amendment among general rights assured to persons and property; it should have been written into the sixth, where protections for persons accused of crime — when they appear at the bar as defendants — are specified. For the unambiguous words of the amendment truly give "no privilege against self-

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1 Cf., A.B.A. Commission On Organized Crime, *Organized Crime and Law Enforcement*, N.Y., (1952), pp. 59-60 *et passim*; Ploscowe, *How To Make Gangsters Talk*, This Week Magazine, Feb. 1, 1953, p. 7. In the period 1952-5, following popularized investigations into organized crime and subversive activities, more than a score of immunity proposals were introduced and seriously considered by the 82nd and 83rd Congresses.

2 Brown, *Immunity for Witnesses in Congressional Hearings*, 1 U.C.L.A. L. REV. 183 (1954); King, *Immunity for Witnesses: An Inventory of Caveats*, 40 A.B.A.J. 377 (1954); Boudin, *The Immunity Bill*, 42 Geo. L.J. 497 (1954); *Association of the Bar of the City of New York, Committee on Federal Legislation, Report on Pending Immunity Bills*, July, 1954.

incrimination"³ at all. They merely say that no person shall be compelled *in any criminal case* to be a witness against himself.

A criminal case is a prosecution by some public authority (in amendment V only the *federal* authority is being defined) brought to secure the conviction of one or more defendants for the commission of crime. Those who testify for the prosecutor give evidence tending to incriminate the accused, and are hence witnesses "against" him; so the amendment says that an accused person shall not be forced to take the stand and give evidence prejudicial to himself *in his own trial*. Or, extended to their uttermost, the words might be construed to mean that witnesses need not give evidence directly admitting crimes by themselves when they have been put under oath and forced to speak in the course of someone else's "criminal case." But in both these instances what is really at stake is a *confession*, extorted from a defendant or a witness in a criminal proceeding by compulsion under oath, and nothing else.

If we were starting afresh, much could be said for limiting the privilege to precisely what the Founders specified, and thus curtailing it to its narrowest reach. Many legal systems, including some very fine ones, have operated justly without any such protection for anyone.⁴ Much could be said for construing the entire clause as a mere defense for perjury — if and when a witness was later charged with lying under oath to avoid admitting guilt.⁵ Or we might relegate the doctrine to uncontroversial service as a guiding principle in the law of confessions (which has no landmarks expressly fixed by the Bill of Rights).

But we are not making a new start, and the concept we have now to work with is scarcely recognizable as related to its textual progenitor. Witnesses may "take the fifth" not merely in criminal cases but in any proceeding whatsoever, wherever an oath is administered;⁶ the privilege protects the accused defendant and the casual bystander alike;⁷ and the notion of criminality has been transposed so that any ultimate danger of being convicted of crime suffices to call the protection into play.⁸ At the same time, perhaps by the mere semantic expedient of dubbing it "privilege" instead of "right," this clause has come to be regarded as not automatic, unlike other comparable Bill of Rights safeguards, so it can be waived and the waiver can be unwitting.⁹ Our Supreme Court suggests that it

3 If this phrase had been coined by scholars, one would expect it to have preserved the older, purer verb "criminate"; *incriminate* is a vulgar and slightly redundant late-comer to our lexicons.

4 *Palko v. Connecticut*, 302 U.S. 319, 326 (1937); Baker, *Self-Incrimination: Is the Privilege an Anachronism?*, 42 A.B.A. J. 633, (1956).

5 Cf., Frank C. J., dissenting in *United States v. Grunewald*, 233 F.2d. 556, 578 *et passim* (2nd Cir. 1955), reversed, 353 U.S. 391 (1957).

6 *McCarthy v. Arndstein*, 266 U.S. 34 (1924); *United States v. Salline Bank of Virginia*, 26 U.S. (1 Peters) 100 (1828).

7 8 WIGMORE EVIDENCE § 2250 (3rd ed. 1961). Wigmore alludes to the "vital distinction" between defendants and witnesses, which, he says, "comes to be ignored" after *Lilburn*. *Id.* at 289-90.

8 *United States v. Saline Bank of Virginia*, *supra*, note 6. The substantiality of the risk must be determined by the interrogating tribunal. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

9 *Rogers v. United States*, 340 U.S. 367 (1951); *United States ex rel Vajtauer v. Comm'r. of Immigration*, 273 U.S. 103 (1927). Cf., *Emspak v. United States*, 349 U.S. 190 (1955). No such rule is recognized in England. Wigmore, *op. cit. supra*, note 7, § 2276 474 (1847).

is a lesser protection than others set forth beside it — that loss of the privilege and its corollary protections would not amount to a deprivation of “due process” under amendment XIV.¹⁰ And lawmakers are permitted, as we shall see, to destroy the meaning of the words altogether for certain persons and to confer on them, willing or no, a quite different immunity in lieu of what the Founders intended.

If applicable, the self-incrimination clause allows silence as to facts which might merely lead to the discovery of crime, i.e., “links in the chain”;¹¹ it applies strictly to the witnesses’ own putative criminality, and not to that of third persons¹² or corporate bodies,¹³ nor to mere embarrassment, disgrace or infamy;¹⁴ its application to the production of documentary evidence is irregularly defined;¹⁵ and the extent to which it projects from the federal jurisdiction to that of each state, and vice versa, is still questionable despite a whole line of decisions on the point.

Small wonder that this doctrine has been characterized by respected modern commentators as everything from “an old friend . . . one of the great landmarks in man’s struggle to make himself civilized,”¹⁶ to “this priceless boon to the criminal . . . an impediment to the administration of criminal justice.”¹⁷

In England more than a century before our Revolution our forebears evolved the sweeping doctrine, *nemo tenetur accusare seipsum*, in a bitter struggle against tortures and test oath administered in the hated Star Chamber and before the King’s Courts of High Commission.¹⁸ No man should be driven to accuse himself — anywhere, under any circumstances — the doctrine held. This struggle succeeded, after martyrdoms and setbacks, early in the seventeenth century. But it played no part in the efforts of Americans to free themselves from King George III, and it was notably missing from most of their colonial declarations, charters, constitutions and Bills of Rights.¹⁹ It received no attention at the Philadelphia Convention, and the first nine ratifying states made no mention of it among their various suggestions for Bill-of-Rights amendments. The last four states to join the union: Virginia, New York, North Carolina and Rhode Island, proposed that some such right be included; Madison embraced it (as a *general* proposition, in amendment V) in his draft, and the limiting words “in any criminal case” were inserted upon the proposal of John Lawrence of New York. All that shows in the records of the proceedings is that Mr.

10 *Ensign v. Pennsylvania*, 227 U.S. 592 (1913); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Palko v. Connecticut*, *supra*, note 4, at pp. 326-7.

11 *Hoffman v. United States*, *supra*, note 8; *McCarthy v. Arndstein*, *supra*, note 6; *Blau v. United States*, 340 U.S. 159 (1950).

12 *Rogers v. United States*, 340 U.S. 367, 371 (1951).

13 *Heike v. United States*, 227 U.S. 131 (1913); *Hale v. Henkel*, 201 U.S. 43 (1906).

14 *Brown v. Walker*, 161 U.S. 591, 605-6. (1896).

15 *Boyd v. United States*, 116 U.S. 616 (1886). Cf., *Shapiro v. United States*, 335 U.S. 1 (1948); *Sullivan v. United States*, 274 U.S. 259 (1927).

16 Griswold, *The Fifth Amendment: An Old and Good Friend*, 40 A.B.A. 502, 503 (1940).

17 Minton, *Should the Right to Be Immune from Self-Incrimination Be Abridged in the State Courts?* 2 CRIM. L. REV. 36, 38-40 (Supp. 1955).

18 Corwin, *Self-Incrimination*, 29 MICH. L. REV. 1, 3 (1930).

19 Baker, *op. cit.*, *supra*, note 4, at 634; Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935). See generally, *Twining v. New Jersey*, *supra*, note 10, at 100-110.

Lawrence "thought it ought to be confined to criminal cases,"²⁰ and that all, including Madison, apparently concurred.

The basis of Lawrence's position, and the intent of the House in the matter, is not hard to define if one recalls that convicted felons and persons accused of crime were not competent as witnesses, even if they wished to testify in their own behalf, until well into the nineteenth century;²¹ it was manifestly fair to give *them* a right of silence if they should be called upon to take the stand by their prosecutors. So the American version, thus belatedly inserted, was a far more restricted statement than its Anglo-Latin antecedent. And the tendency among commentators to dwell upon the dramatic events surrounding John Lilburn's trial in the 1640's is highly misleading in seeking understanding of what the Founders intended to set down in 1789.

The full fifth amendment privilege of silence, as we have come to accept it, combines three disparate elements: (1) the privilege of the *accused*, formally charged with crime, to remain silent at his own trial; (2) the privilege of a *suspect* to be free of sanctions applied to make him confess; and (3) the privilege of *unsuspected persons* to conceal guilt known only to themselves. These elements have little in common beyond their end result, which is to defeat the interrogator and to overturn the maxim, "the public has a right to every man's evidence."²² It is striking that all three are plainly embraced in the scope of the Latin embodiment propounded in England, while only the first is consistent with the unambiguous wording of the American version. So what our judges and scholars seem actually to have done is write the former, practically in its entirety, into the latter.²³

The first element, following the literal sense of the fifth amendment, has never given trouble. It limits the *judicial* process in subjecting persons who are facing prosecution and who have asserted their innocence to the rigors and risks of involuntary testimony in court. Additional support for the proposition that this is what John Lawrence intended may be found in the fact that well into the eighteenth century English common-law courts were still countenancing responsible interrogation of prisoners in the dock by the presiding judicial officer.²⁴ The clause as written resolved a then-contemporary question, namely, whether an accused defendant should be examined, against his will, in the course of his own trial, or narrowly, "be compelled in any criminal case to be a witness against himself."

In any event, all American courts in all criminal proceedings have consistently allowed defendants to preserve their silence in this situation, and to this extent the self-incrimination clause has been lucid and effective. However,

20 1 *Annals of Congress* 782 (1789).

21 *Wolfson v. United States*, 101 F. 430, 435-6 (5th Cir. 1900), cert. den. 180 U.S. 637 (1901). See, Huard, *The Fifth Amendment — An Evaluation*, 42 GEORGETOWN L. J. 345, 354-62 (1954).

22 Wigmore, *op. cit.*, supra, at 71, quoting Hardwicke, L.C.

23 See, Magruder, C.J., in *Maffie v. United States*, 209 F.2d. 225, 227 (3rd Cir. 1954): "Our forefathers, when they wrote this provision . . . had in mind a lot of history which has been largely forgotten today." Quoted by Frankfurter, J., in *Ullmann v. United States*, 350 U.S. 422, 427 (1956).

24 Wigmore, *op. cit.*, supra, note 7 at 291; *Twining v. New Jersey*, supra, note 10, at 102-5.

it should be noted in passing that other protections, not written into the Constitution at all, have been of at least equal protective value to defendants, e.g., the hearsay and best evidence rules, protection of confidential disclosures, the defense of entrapment, development of the insanity defense, and so forth. And it might also be questioned whether abandoning this element of the concept altogether, and subjecting all persons accused of crime to orderly examination, might not benefit the innocent as much as it could conceivably embarrass or prejudice the guilty.²⁵

The second element which has been read into the self-incrimination clause, i.e., protection of the suspect, is principally a limitation on the activities of the *executive* branch of law enforcement in the discovery and apprehension of perpetrators of crime. Glimpsing an occasional shadow of the brutal police interrogator, we have sought to embrace him in this fifth amendment prohibition along with overbearing judges and prosecutors, stretching it to accord the suspect certain rights and weaving it into our public policy regarding confessions. Yet the language does not suit the purpose well, and the landmark protections for suspected persons have mostly grounded in other principles. Could the Founders have been thinking of police brutality by federal investigators when they adopted the Madison-Lawrence amendment? It may be strongly argued *contra*, since the federal executive had little to do with general law enforcement until a century later when Congress began to use the commerce clause as a basis for extending the federal penal code into many new fields.²⁶ The extorted confession might have been a very real threat to sixteenth and seventeenth century Englishmen; but it doubtless meant less to eighteenth century Americans contemplating a system of limited federal powers.

The third element of privilege associated with the fifth amendment — and the source of nearly all contemporary difficulties — is its purported limitation on compulsory examination outside the scope of direct investigation or prosecution which might expose undetected and unsuspected crimes committed by the person interrogated.²⁷ This affects the casual witness in civil and criminal cases alike, but it has also been applied to extra-judicial inquiries as a curb upon *legislative interrogators*.²⁸ Its origins trace plainly to the murkily remembered test oaths administered in the day of James I and Charles I.²⁹ Then, as now, fair-minded men recoiled at the prospect of trials by oath and limitless inquisition to disclose possible malfeasances which could thereafter serve as bases for accusation and prosecution. Our Supreme Court was surely moved by the highest considerations of justice when it began applying the self-incrimination clause as a safeguard against this kind of abuse. But it is doubtful whether the Founders had any such extended application in view; men so remarkably endowed with the gift of clear expression could scarcely have failed so com-

25 See, e.g., *Adamson v. California*, 332 U.S. 46 (1946); *Palko v. Connecticut*, *supra*, note 4; *Baker, op. cit.*, *supra*, note 4 at 634-6.

26 See, King, *The Control of Organized Crime*, 4 STANFORD L. REV. 52, 53 (1951).

27 See, *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *United States v. Bryan*, 339 U.S. 323 (1950).

28 Huard, *op. cit.*, *supra*, at 353; Morgan, *Congressional Investigations and Judicial Review*, 37 CAL. L. REV. 556 (1949); Fay, *Trends in Judicial Relief for Legislative Witnesses*, 29 NOTRE DAME LAWYER 225 (1954).

29 See, Douglas, J., dissenting in *Ullman v. United States*, *supra*, note 23, at 445 ff.

pletely at this one point if they had wished to write Lilburn's triumph over the oath ex officio into our Bill of Rights.

Was it then intended to ignore the dangers of runaway investigations and revivals of crude Star Chamber tyranny? Clearly, the executive and judicial arms were subjected to other curbs in the Bill of Rights, curbs which have in fact proved adequate to protect individuals against serious mistreatment at their hands. And it was plainly contemplated that Congress, answering directly to the electorate, would impose fairness and moderation upon itself: "Each House may determine the rules of its proceedings . . ." ³⁰ in matters pertaining to the exercise of its own fact-finding powers. Congress and its members were given absolute immunity for defamatory accusations, ³¹ in confidence that the lawmakers' own system of internal responsibility, plus their answerability at the polls, would discourage abuses. And the problems that have so strained the fifth amendment in recent years are thus, in large measure, rightly subject to other constitutional limitations. The means for their solution appear elsewhere in that great instrument.

In sum, then, it may be argued that the fifth amendment privilege should have been confined narrowly to the protection of persons accused of crime when they appear as defendants in their own trials; it has been extended to protect two other classes, namely, persons merely suspected and under investigation, and unsuspected persons who have in fact some guilt to conceal.

This suggests an answer to the question that has caused most discomfort among modern-day students of the privilege: When may an *innocent* person rely upon the fifth amendment to defy interrogation under oath? ³² The answer is: In only one situation — when he has been formally indicted or charged and has interposed the plea of "not guilty." Hence, the innocent pleader does exist, but he can be found only in the prisoner's dock. In all other situations the presence of potential guilt and a possibility of criminal conviction is an indispensable condition to invoking the protection of this clause. The innocent suspect has recourse to other protections against third degree tactics; ³³ the innocent and unsuspected witness may resist fishing expeditions on the grounds of relevancy, materiality, invasions of his personal freedom, and so forth; ³⁴ but neither may rightly qualify for protection against the danger of self-incrimination. This is a simple measure of legal right. ³⁵ The fifth amendment is not a refuge for the innocent, except as noted, no matter how considerations of sympathy or expediency may sometimes urge us to make it so.

30 Const. Art. 1, Sec. 5, cl. 2. See, Scott & King, *Rules for Congressional Committees*, 40 VA. L. REV. 249, 250-1 (1954).

31 Const. Art. 1, Sec. 6, cl. 4. See, Fay, *op. cit.*, *supra*, note 28, at 228.

32 See, e.g., Griswold, *The Fifth Amendment Today*, Cambridge, (1955); Brown, *Lawyers and the Fifth Amendment*, 40 A.B.A. J. 404 (1954); *Ullman v. United States*, *supra*, note 23 at 426-7.

33 See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936): though it is to be hoped that some day our society will find a better sanction against abusive enforcement officers than merely freeing their victims, without any regard for the victims' guilt or innocence. Cf., 18 U.S.C. 241-2; *Williams v. United States*, 341 U.S. 97 (1951).

34 Fay, *op. cit. supra*, note 28; *United States v. Rumeley*, 345 U.S. 41 (1953).

35 Compare, Const. Amendments VI and VIII; there is no vague element of "privilege" in similar provisions as to speedy trial, the confrontation of witnesses, or bail and cruel punishment.

And this last conclusion tends to rationalize current tendencies to penalize those who invoke the privilege in proceedings outside the criminal courts.³⁶ Witnesses who choose this course rightfully confess responsibility for some punishable crime related to the inquiry they are resisting. The sanctions that discourage its use are justified by the consideration that it is chosen as an alternative, preferable in the witness' judgment, to disclosures that would necessarily support a criminal conviction (and surely we need not pursue the absurdity of further distorting an already tortured concept to shield persons who invoke it in bad faith or on erroneous advice). The witness emerges "technically innocent and actually free."³⁷ Remedies for inquisitorial abuse which may bring individuals recklessly to such a choice in the first place should be sought outside the fifth amendment.³⁸

The foregoing is probably a sufficient indication of the background against which the immunity device must be appraised, so let us now turn to it. In the middle of the nineteenth century, faced with extensions of the privilege into areas not contemplated by the Founders, Congress seized upon another bit of English history as authority to place drastic limits upon the scope of the self-incrimination clause (precisely where it had been unnecessarily expanded, on English precedents, in the first place). The king's prosecutors had early discovered that they could overcome pleas of the privilege by tendering each witness a royal pardon for crimes which he might be compelled to disclose,³⁹ and Parliament achieved the same result by use of its amnesty powers.⁴⁰ So when bona fide grand jury and legislative inquiries began to encounter obstructionist pleaders of the fifth amendment,⁴¹ Congress turned to the expedient of a general immunity law.

The first enactment in 1857 provided that no person who testified before either House of Congress or any committee of either House could be prosecuted for any act or facts as to which he had so testified.⁴² But this law overshot the mark, conferring blanket and automatic immunity upon all comers, and it soon became apparent that flagrantly guilty persons were taking advantage of it to receive "immunity baths," including one brash official of the Interior Department who confessed to a committee that he had embezzled two

36 See, Brown, *op. cit.*, supra, note 32; Boudin, *op. cit.*, Douglas, J., dissenting in *Ullman v. United States*, supra, note 23 at 440.

37 Hoffman, *Whom Are We Protecting?*, 40 A.B.A. J. 582, 583 (1954).

38 Problems in this field have been much studied: there are three excellent symposia, 29 NOTRE DAME LAWYER (1954), 18 U. CHI. L. REV. (1951), and 14 FED. B. J. (1954). See also, Scott and King, *op. cit.*, supra, note 30; Maslow, *Fair Procedure in Congressional Investigations*, 54 COLUM. L. REV. 839 (1954); A.B.A. Special Committee on Individual Rights, *Report on Congressional Investigations* (1954); "Congressional Power of Investigation," Sen. Doc. 99, 83rd Cong., 2d. Sess. (1954).

39 Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949). It should be noted in passing that an executive pardon, in our system, may be refused. *Burdick v. United States*, 236 U.S. 79 (1915).

40 "The distinction between amnesty and pardon is of no practical importance." *Brown v. Walker*, supra, note 14, at 601. Nor does the notion of amnesty for individuals seem to have given trouble. 8 WIGMORE, *op. cit.*, supra note 7, § 2281. But cf., *Doyle v. Hosstader*, 257 N.Y. 244, 177 N.E. 489 (1931).

41 The earliest provocation was a newspaper reporter's refusal to substantiate sensational bribery charges made against members of Congress itself in the 1850s. Boudin, *op. cit.*, supra, note 2, at 509.

42 11 Stat. 155 (1857).

million dollars of public funds in federal bonds.⁴³ Reacting to this, Congress modified the law in 1862 so that it merely precluded use against the witness, in a criminal proceeding, of the testimony he had given.⁴⁴ A few years later, Congress added a general statute which would have given similar immunity for testimony compelled in any federal judicial proceeding.⁴⁵ But this latter enactment was invalidated in *Counselman v. Hitchcock*,⁴⁶ on the ground that the protection afforded was not commensurate with the privilege; thereafter, the general congressional statute, though remaining on the books, was acknowledged to be a dead letter.⁴⁷

Congress has never since passed a general immunity statute for itself, and the immunity device has not been made generally available to federal prosecutors. Instead, immunity provisions have been written into the laws creating nearly all the specialized federal regulatory agencies, commencing with the Compulsory Testimony Act of 1893,⁴⁸ which empowered the Interstate Commerce Commission, and now including an astonishing list of over three dozen.⁴⁹ The formula used, upheld in *Brown v. Walker*,⁵⁰ provides variously that the witness may not be prosecuted or otherwise subjected to penalty or forfeiture concerning any matter about which he has been compelled to speak; and in some, even the requirement of compulsion is left out, i.e., mere testimony under oath, without having first interposed the privilege, is enough.⁵¹

In 1954, Congress adopted a new approach in P.L. 83-600,⁵² which revives a valid immunity power for Congress, and confers an effective power on the federal prosecutive arm for the first time in history⁵³ by authorizing both congressional committees and United States Attorneys to compel testimony touching on matters affecting treason, subversion or national security. This law was upheld in *Ullman v. U.S.*⁵⁴ Most recently, this approach has been expanded by conferring similar powers on the Department of Justice with respect to nar-

43 Cong. Globe, 37th Cong., proceedings Jan. 22, 1862.

44 12 Stat. 333 (1862).

45 15 Stat. 37 (1868).

46 142 U.S. 547 (1892).

47 See, *United States v. Bryan*, supra, note 27, at 33-37. The 1868 Act was repealed May 7, 1910, 36 Stat. 352. Its Congressional companion, 18 U.S.C. 3486, was revived and given limited application in *Adams v. Maryland*, 347 U.S. 179 (1954), further discussed herein at p., post.

48 27 Stat. 443, 49 U.S.C. 46 (1893).

49 Twenty-six are listed in *Shapiro v. United States*, supra, note 15, at 6, fn. 4, itself construing the provision in the Emergency Price Control Act, 50 U.S.C. 90. For others see, 15 U.S.C. 715(h) (Hot Oil); 50 U.S.C. 2155(b) (Defense Production); 12 U.S.C. 1820(d) (F.D.I.C.); 15 U.S.C. 80b-9(d) (Investment Advisors); 15 U.S.C. 80a-41(d) (Investment Companies); 15 U.S.C. 79r(e) (Public Utility Holding Companies); 50 U.S.C. 2026(b) (Export Control); 15 U.S.C. 155(c) (China Trade); 26 U.S.C. 4874 (Cotton Futures); 49 U.S.C. 43 (Elkins); 15 U.S.C. 49 (Federal Trade); 29 U.S.C. 521 (Labor-Management Reporting); 15 U.S.C. 32-3 (Sherman); 19 U.S.C. 1333(e) (Tariff).

50 161 U.S. 591 (1896).

51 See, *United States v. Monia*, 317 U.S. 424 (1943).

52 68 Stat. 745, 18 U.S.C. 3486 (1954).

53 Though it may be noted that some of the regulatory acts cited supra, note 48, extended the power to grant immunity to enforcement proceedings in the courts, e.g., Communications Act, 47 U.S.C. 409(l) (1934) See, *Marcus v. United States*, 310 F.2d 143 (3rd Cir. 1962).

54 350 U.S. 422 (1955).

cotic drug law offenses in the Narcotics Control Act of 1956,⁵⁵ upheld in *Reina v. U.S.*⁵⁶

The most striking thing about all the regulatory acts is that though many of them have been tucked away in the United States Code for as long as half a century, none seem to have given much trouble, on the one hand, nor to have played any spectacular part in the affairs of the agencies they affect, on the other. Their insignificant history suggests that the immunity device may be overrated by both its critics and its advocates. The two innovations by Congress in allowing itself and federal prosecutors to confer immunity in national security cases, and empowering the latter to compel testimony in narcotics cases, also have had no signal repercussions in our nearly ten years' experience with them. Several important prosecutions have been concluded in the narcotics field which might have failed without the compelled testimony of minor participants. The present administration sought — and should have been given — immunity powers with the new legislation aimed at illegal gambling activities,⁵⁷ for this is another special area where the testimony of underlings may often be required to convict ringleaders.⁵⁸

In short, I believe that in the organized crime categories mentioned at the outset, and even perhaps in all conspiracy cases, the prosecutive arm should have this device at its disposal. It would be useful to experiment, and the device might prove a good weapon in combatting syndicated crime. We should also experiment with various safeguards. No new enactment should confer immunity automatically, as some of the regulatory measures do; all should exclude the offenses of contempt and perjury from the scope of their immunization;⁵⁹ and, perhaps, all should require the concurrence of the Attorney General or, as was urged in the hearings on the 1954 bill, of a federal judge⁶⁰ before their provisions could come into play.⁶¹

We should proceed step by step. I do not believe it would be wise to resurrect any general power for Congress and its committees, or to confer such authority across the board in all federal judicial proceedings, for there are some thorny problems which remain to be faced and solved.

In the first place, the overlapping sovereignties in our federal union poses a problem which did not plague the English and which has not been satisfactorily resolved. To what extent does immunity conferred under a federal statute bar prosecution for identical or related offenses under local laws and vice versa? The holdings of the Supreme Court on this subject do not suggest a clear answer.

55 70 Stat. 574, 18 U.S.C. 1406 (1956).

56 364 U.S. 507 (1960).

57 E.g., S. 1658, 87th Cong., which became P.L. 87-840, Act of Oct. 18, 1962, 76 Stat. 1075, 15 U.S.C. 1171-8. The immunity provision was inserted in the House (Committee on Interstate and Foreign Commerce, Rept. No. 1828) and deleted by the House-Senate conferees.

58 See, Special Committee to Investigate Organized Crime in Interstate Commerce, Third Interim Report, 82d. Cong., Sen. Rept. No. 307, (1951), pp. 1-5.

59 *Glickstein v. United States*, 222 U.S. 139 (1911); *United States v. Bryan*, *supra*, note 27.

60 The status of the requirement written into the 1954 Act is uncertain. See, *Ullman v. United States*, *supra*, note 23, at 431-4.

61 For a careful study of problems and safeguards, see Kernochen, *Model State Witness Immunity Act*, Nat. Conf. of Commrs. on Uniform State Laws (1952).

At the outset, in the landmark case of *Brown v. Walker*,⁶² a majority opined that the federal statute under consideration would actually operate as a bar to the enforcement of state criminal laws. A decade later, in *Jack v. Kansas*,⁶³ the Court was confronted by the reverse question, i.e., whether a state immunity statute could confer protection against federal prosecution, and upheld the state statute with the strange suggestion that federal prosecutors simply could not be expected to be so unsporting as to rely on testimony thus compelled: "We do not believe that in such case there is any real danger of a Federal prosecution, or that such evidence would be availed of by the government for such purpose."⁶⁴

The following year, in *Hale v. Henkel*,⁶⁵ upholding another federal immunity statute, the Court voiced this same sportsmanship notion again: "... a danger (i.e., of state prosecution) so unsubstantial and remote did not impair the legal immunity."⁶⁶ In this opinion, however, the Court also alludes to the English rule on possible incrimination under the laws of foreign nations: "... the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty."⁶⁷

In later cases the Court expanded the separate sovereignty reasoning, insisting that a danger of state prosecution neither creates a privilege in federal proceedings nor invalidates the federal immunity grant.⁶⁸ And finally, in *Feldman v. U.S.*,⁶⁹ the Justices, abandoning all shreds of their sportsmanship notion, approved precisely what the earlier cases had refused to recognize as even a noteworthy possibility by upholding a federal mail fraud conviction obtained by introducing the direct transcript of testimony which had been forced from the defendant under a New York immunity statute.⁷⁰

In its most recent pronouncements, the Court seems to resurrect the possibility that Congress *might* constitutionally bar state prosecution. Thus, in *Adams v. Maryland*,⁷¹ the otherwise dead act of 1868 was enforced insofar as it prohibited the direct use of testimony exacted by Congress in a subsequent state criminal proceeding. *Ullman v. U.S.*,⁷² supra, upheld the 1954 federal act with a passing suggestion that in this field, i.e., national security, Congress might have immunized witnesses against state prosecution,⁷³ and *Reina v. United States*⁷⁴ supra, sustained the 1956 narcotic drug provision.

62 161 U.S. 591 (1896).

63 199 U.S. 372 (1905).

64 *Jack v. Kansas*, 199 U.S. 372, 382 (1905).

65 201 U.S. 43 (1906).

66 *Hale v. Henkel*, 201 U.S. 43, 69 (1906).

67 *Ibid.*

68 *Twining v. New Jersey*, supra, note 10; *United States v. Murdock*, 284 U.S. 141 (1931).

69 322 U.S. 487 (1944).

70 The Court recedes to the narrow ground that such practices are unobjectionable as long as there is no collusion between the federal and state authorities, *Byars v. United States*, 273 U.S. 28 (1927), and is only slightly embarrassed by the "phrase of scepticism" and "cautionary words" of the earlier opinions, 322 U.S. 487, 493-4.

71 347 U.S. 179 (1954).

72 *Supra*, note 54.

73 350 U.S. 422, 436. The majority also expressly reaffirms *Brown v. Walker*, supra, note 14, on this point. *Ibid.*, 436-9.

74 *Supra*, note 56.

Here again the English precedent seems inapposite. There is a vast difference between the jurisdiction of separate national sovereigns and the overlapping powers of federal and state governments within our federal system; and it seems obvious that when testimony is extracted from a witness under compulsion by one authority and then used directly to convict him of a crime by another in the same situs, the fifth amendment injunction that no person "shall be compelled in any criminal case to be a witness against himself" is being torn to shreds.⁷⁵ Nor would it be practicable to extend the protections and make immunity absolute, for even though a paramount federal interest might in some cases justifiably be held to defeat local prosecutions,⁷⁶ the logical converse — allowing the states to bar federal actions — would produce chaos.⁷⁷

In the second place, the immunity bargain is a somewhat unsavory device per se, inaccurate and potentially very unfair; it should be used only sparingly and where it is absolutely required. Immunity grants are always exchanges, a pardon for crimes that would otherwise be punishable, given in return for testimony that could otherwise be withheld. In every case the interrogating authority must enter into a special "deal" with a wrongdoer to buy his testimony at the price of exoneration for something for which he would otherwise deserve punishment. Quere whether public officers are justified, except in most unusual circumstances, in pursuing any quest for facts in this faintly immoral manner, smacking as it does of the turncoat, the informer, and the cynical payoff for "spinning" one's associates to help the government make its case. And how reliable is such testimony likely to be when grounded in such a bargain anyway? Why should we — again excepting most extraordinary circumstances — give any miscreant the windfall of a complete defense for his wrongdoings merely because, after the fact, a prosecutor wishes him to "sing" or because some legislative body would like to hear his story before he is caught and brought to justice?

Such bargains are always somewhat blind. Ordinarily the witness will be hostile, so that his examiners cannot be sure in advance exactly what value the withheld testimony will actually have. And at the same time, especially in broad legislative or administrative inquiries, it is impossible to tell beforehand just what crimes are likely to be exonerated. Conceivably, the witness may have a surprise ready for his questioners at every turn of the proceedings.

The bargaining terms are also likely to be obscured because the privilege against self-incrimination is itself surrounded by so many complicated concepts that no one can be sure of its application under all circumstances. Does the witness really have a privilege to be given up? It may have been waived if he has already answered some question too closely linked to the dangerous subject matter.⁷⁸ On the other hand, it may attach to some line of inquiry only tenuously connected with his offense.⁷⁹ It is nonexistent (or at least it is *prob-*

75 See, e.g., Black, J., dissenting in *Knapp v. Schweitzer*, 357 U.S. 371, 384 (1958).

76 See, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

77 Cf., *In re Watson*, 293 Mich. 263, 291 N.W. 652 (1940); *People v. Den Uyl*, 318 Mich. 645, 29 N.W. 2d. 284 (1947).

78 Dean Griswold urges, with compelling force, that the entire doctrine of waiver in this context might happily be abandoned.

79 See note 11, *supra*.

ably nonexistent) if his crime was committed in another jurisdiction or against a different sovereign; it does not attach merely for the protection of others or to avoid embarrassment or degradation, and it is wiped out with respect to offenses no longer punishable because of the running of a period of limitation, the repeal of a law, prior jeopardy, and so forth.

It must also be remembered that the witness — who alone knows what he fears to disclose — cannot be pressed too hard as to the exact nature of his crimes, for to permit this might demolish the very protection which is at issue.⁸⁰ This problem is greatly aggravated when the inquisitorial power is a legislative body or some administrative agency rather than a party in a judicial proceeding, for then there is no presiding and presumably impartial judge, and no possibility of discreet private inquiry. In this connection however it should be noted that over a score of the agencies which have immunity legislation also have a provision in their statutes which allows them to apply to a federal district court for orders enforcing their subpoenas, compelling the production of documents, compelling testimony, and so forth.⁸¹ A proposal originated by Senator Keating in 1953, while he was still a member of the House, and pending in every Congress since,⁸² would permit congressional committees to make similar application. This device goes far to meet the foregoing criticism with respect to the agencies which have it, and it would be eminently salutary as an adjunct of the congressional power as well.⁸³ With it, both the witness and the agency or committee may resolve contested issues as to the conduct of an inquiry, including issues as to the privilege, promptly before a judge. And witnesses who defy the authority of Congress would face the plenary contempt powers of the court immediately, instead of being able to stall through the cumbersome processes of legislative reference and eventual prosecution, long after the event, under Congress' present contempt statute.⁸⁴

Furthermore, the prospect of a broadened immunity power revives the old bugbear of the "immunity bath." Although, as has been noted, little difficulty seems to have been encountered on this score by the federal agencies which have long had immunity powers for their own proceedings, the situation might be quite different if the device were generally available in all federal prosecu-

⁸⁰ See, *Hoffmann v. United States*, supra, note 8, 341 U.S. at 486.

⁸¹ 5 U.S.C. 1005 (Administrative Procedures); 9 U.S.C. 7 (Arbitration); 42 U.S.C. 2281 (Atomic Energy); 11 U.S.C. 69 (Bankruptcy); 49 U.S.C. 1484 (Civil Aeronautics); 5 U.S.C. 773 (Employees Compensation); 47 U.S.C. 409(e) (Federal Communications); 22 U.S.C. 270f (International Tribunals); 15 U.S.C. 49 (Federal Trade); 49 U.S.C. 12(3) (I.C.C.); 29 U.S.C. 161 (N.L.R.B.); 35 U.S.C. 24 (Patent Office); 7 U.S.C. (Perishable Agricultural Commodities); 5 U.S.C. 118k (Political Activities of State Employees); 45 U.S.C. 362 (Railroad Unemployment); 15 U.S.C. 78u (S.E.C.); 19 U.S.C. 1333(b) (Tariffs); 50 U.S.C. 819(d) (Detention Review); 12 U.S.C. 1820 (F.D.I.C.); 50 U.S.C. 792(c) (Subversive Activities).

⁸² As H.R. 4975 this measure passed the House in the 83rd Congress (1954), and as H.R. 780 it again passed the House in the 84th Congress (1956), both times expiring in the Senate.

⁸³ For support for the proposition that Congress could thus invoke the assistance of the courts without constitutional objection, see *In re Chapman*, 166 U.S. 661 (1897). Cf., *Ullman v. United States*, supra, note 23, at 431-5. See also, *United States v. Rumeley*, supra, note 34.

⁸⁴ 2 U.S.C. 192, 194, which make defiance of Congressional authority a misdemeanor.

tions or in all cases where the government is a party.⁸⁵ In the new pattern established by the 1954 and 1956 acts (pertaining to national security and narcotic drug offenses) immunity can be conferred in court or grand jury proceeding only with the concurrence of the Attorney General, a feature written into these acts to provide some safeguard against the reckless immunizing of wrongdoers for unimportant purposes. This requirement has occasioned no difficulty in the handful of cases where the acts have been invoked to date. But it would not work on any large scale, for in each case it would mean the delay of a communication with Washington, frequently in the midst of a trial on some crowded federal docket.

And although the Attorney General may be in a position to make an informed judgment about witnesses sought to be compelled to testify by a federal prosecutor, this is not the full scope of the problem. Suppose, for example, that a *defense* counsel in a drug case⁸⁶ approaches the bench and shows the court and the U. S. Attorney that his client has an absolute exoneration which can only be elicited at the price of immunity for his key witness. Will the device be denied him in this situation? Would it be consistent even with due process requirements to allow it to the prosecution and not to the defense?⁸⁷ And what about civil litigation, if the concept is broadened? With the omnipresent spectre of income tax evasion there might be endless maneuvering to jockey witnesses into a position where they could make some relevant disclosure about past defections *vis-a-vis* the tax collector (and note that most of the current statutes provide immunity from *penalties* as well as from prosecutions).

Finally, a special problem arises where the privilege is claimed and immunity is demanded by public officials themselves. The State of New York has long had a noteworthy solution. In that state, by express constitutional provision, any person who avails himself of the privilege with respect to any matter pertaining to his incumbency in a public office automatically forfeits such office.⁸⁸ This seems manifestly fair, for no one, immune or not, should defy the public in accounting for his discharge of a public trust without thereby forfeiting his office and its emoluments. A similar provision has been proposed from time to time in Congress and ought to be incorporated in the Federal Code.⁸⁹

In summary, this discussion has been addressed to one of the most confused and unsatisfactory areas in the panorama we are viewing in this symposium. The root of difficulty seems to lie in an astonishing distortion of language in the Constitution whose meaning is unequivocal; the preferred remedy would be a narrower interpretation of the fifth amendment privilege at the hands of the courts, but current judicial trends hold little promise of this. So I suggest for our discussion that the immunity device is a valid palliative, available and probably

85 Note that a number of the statutes collected *supra*, n. 48, are not limited to law enforcement proceedings, and that some are not even related directly to *any* criminal sanction.

86 I.e., in an area where the immunity device is already available (18 U.S.C. 1406).

87 See Const. Amend. VI conferring a *right* on defendants to compel witnesses to testify for them. The sensitivity of the present Court on such issues is evident in cases like *Gideon v. Wainwright*, 372 U.S. 335 (1963).

88 N.Y. State Constitution, Art. I, Sec. 6 (as amended in 1950).

89 E.g., S.3445, 82d. Cong., 2d. Sess. (1952). Cf. Executive Order 10491, October 13, 1953, 18 F.R. 6583.